

***United States Court of Appeals  
for the Second Circuit***



**RESPONDENT'S  
BRIEF**





# 76-4203

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT  
-----X

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

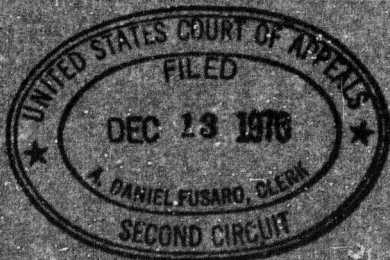
v.

LOCAL 3, INTERNATIONAL BROTHERHOOD  
OF ELECTRICAL WORKERS, AFL-CIO,

Respondent.  
-----X

ON APPLICATION FOR ENFORCEMENT OF AN  
ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR LOCAL UNION NO. 3,  
INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, AFL-CIO.



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B  
P/S



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FOR THE SECOND CIRCUIT

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## A U T H O R I T I E S C I T E D

### Statute:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C., Secs. 151-168, <u>et seq.</u> )	
Section 8(b)(7) . . . . .	.3,4,12,13
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Of Counsel:

Norman Rothfeld

## STATEMENT OF ISSUES PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's finding that Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO picketed Gessin Electrical Contractors, Inc. with an organizational or recognitional object during a period when the Company had lawfully recognized another union and a question concerning representation could not appropriately be raised under Section 9(c) of the Act.

2. Assuming a violation of Section 8(b)(7)(A), whether enforcement by this Court of the Board's Order would effectuate the purposes of the Act.

## THE PURPOSES OF THIS PROCEEDING

### The Board's Purpose

The Board's purpose is to enforce its Order enjoining Respondent from engaging in organizational or recognitional picketing of Gessin Electrical Contractors, Inc. so long as Gessin has such contract with another union as would bar an NLRB election.

Respondent has opposed the Board's Order on the ground that at the time it engaged in organizational picketing Gessin did not have a contract with Teamsters Local 363. Absent such contract the picketing unquestionably was lawful.

Respondent does not doubt that subsequent to and in consequence of its picketing, Gessin did enter into a contract with Teamsters Local 363, and will remain under contract with that Union, in order to be eligible for the Board's protection



against further organizational efforts by Respondent.

Assuming arguendo, therefore, that this Court declines to enforce the Board's Order, Respondent nevertheless is and will remain prohibited from engaging in organizational picketing of Gessin, since such picketing would be violative of Section 8(b) (7) (A) of the Act, and the appropriate United States District Court would promptly enjoin such picketing upon application of a Regional Director of the Board pursuant to Section 10(1) of the Act.

Why, then, has Respondent resisted this Board Order, since Respondent no longer may engage in organizational picketing of Gessin in any event?

#### Respondent's Purpose Herein

Respondent is employing this proceeding as a vehicle to prod the Board into taking some step to deter the noxious practice of backdating labor contracts.

Since Section 8(b) (7) of the Act was enacted in 1959, the date of a union contract has determined whether the first thirty days of organizational or recognitional picketing relating to the employees covered by such contract is lawful or unlawful.

Furthermore, throughout the existence of the National Labor Relations Act, the date of a union contract has determined whether a representation petition for an election filed by another union would result in a Board-conducted election or would be dismissed by the Board administratively without hope for judicial review.

The Board's failure to take the slightest step to deal with the temptation of an employer, when a union with a high wage scale



contract is organizing its employees, to sign a backdated contract with a union whose contract's wage scale is lower, is unjustifiable. Since the Board understandably is reluctant to make findings that parties have backdated a document, such backdating may be engaged in with impunity.

The date of execution of labor contracts is as significant as the date of execution of liens, wills, deeds, leases, mortgages and other business documents, which require verification or registration or both.

The Board should rule that unless a labor contract is executed before a Notary Public who testifies to the date of execution, and/or that unless the Board receives notice that a labor contract has been signed immediately after such execution, said date of execution will not be received as evidence that organizational picketing is unlawful or that the Board should not conduct a representation election.

The Board would not be required to receive and store labor contracts, since an index card setting forth the contracting parties, the date of execution, the date of expiration and a brief description of the bargaining unit covered by the contract would serve the purpose of obviating backdating.

Respondent respectfully urges that this Court address itself to this problem and this suggestion.

#### THE APPLICABLE STATUTE

Section 8(b)(7) in pertinent part reads:

"SEC. 8 (b) It shall be an unfair labor practice for a labor organization or its agents--



(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative,\*\*\*.

(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9 (c) of this Act.

(B) where within the preceding twelve months a valid election under section 9 (c) of this Act has been conducted, or

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing:\*\*\*."

#### THE UNCONTROVERTED FACTS

In September of 1973 Respondent petitioned both the National Labor Relations Board and the New York State Labor Relations for a representation election covering the employees of Gessin Electrical Contractors, Inc. an electrical contractor. The NLRB dismissed Respondent's petition without a hearing on the ground that Gessin was not engaged in interstate commerce. In November 1973 the State Labor Relations Board conducted an election, in which Gessin's employees voted for no union.

Teamsters Local 363 did not appear in the NLRB proceeding nor assert that it had a contract with Gessin. Neither did Teamsters Local 363 appear in the State Labor Relations Board proceeding, nor place its name on the ballot.

In October 1975 Respondent picketed a Gessin job



site with signs stating:

"Employees of Gessin Electric

Join Local Union No. 3 for better wages, conditions  
and benefits

Local Union No. 3, IBEW, AFL--CIO 158-11 Jewel  
Avenue, Flushing, New York 11365 591-4000."

intermittently into November (A. 9).<sup>1/</sup>

On October 16, 1975 one of Gessin's attorneys exhibited to the undersigned a contract between Gessin and Teamsters Local 363 (GCX 2, A. 22) which contained an expiration date of November 14, 1973 together with an automatic renewal clause which by its terms would become effective absent termination notice by either party (A. 38). Gessin's attorney stated that the automatic renewal clause kept the contract in effect and would make Respondent's picketing illegal, and he did not know whether this contract was being adhered to or whether Gessin made contributions to Teamsters employee benefit funds or checked off union dues and sent them to Local 363. Gessin's attorney stated that certain business differences constitute the main barrier to Gessin's signing a contract with Respondent. (A. 10, 128) The undersigned accordingly advised that the expired contract no longer was in effect and therefore would not bar organizational picketing.

Three weeks later Gessin appeared at the NLRB with another document dated February 1, 1974 (GCX 3, A. 40), copy of which is appended hereto as Exhibit "A". This document in part states:

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<sup>1/</sup> "A" references are to the Appendix.



"2. The wage provisions of the aforementioned main agreement shall be modified to provide an increase of cents per hour for each employee covered by said agreement upon the following terms and conditions."

#### THE TESTIMONY

Gessin's two attorneys, present at the Board hearing did not take the stand, nor sought to refute the testimony relating to the conversations in which they participated.

#### The Execution Of The "Extension Agreement".

At no stage of this proceeding did Teamsters Local 363 appear. Local 363's President Gordon Canizio, subpoenaed to testify that he executed GCX 3 on February 1, 1974, telephoned during the lunch recess of the Board hearing that he was sick (A. 122).

Harvey Gessin testified that he did sign GCX 3 on February 1, 1974. On cross-examination, Gessin did not recall any detail of the discussion which preceded this execution, nor anything that occurred that day, nor the name of the Teamster official who signed GCX 2 (A. 74-75, 79-82). Gessin had not checked his office records to verify the date he signed GCX3; he had "no reason to" (A. 116). Said date of execution was not in Gessin's diary because he ceased keeping a diary in December of 1973 and did not resume keeping a diary until September of 1975 (A. 113-115, 118). Gessin testified that he gave GCX 3 to his attorney "probably toward the middle of October" of 1975 (A. 82).

#### Gessin's Contributions to Teamsters Benefit Funds And His Dues Checkoffs.



Gessin testified that he made contributions for his employees to the Local 363 Welfare, Pension and Annuity Funds for 1974 and 1975, and he submitted monthly reports of contributions and copies of the face side of checks, without endorsements (GCX 4 and GCX5, A. 42 et seq and A. 48 et seq, respectively). No Report of the receipt of these funds for 1975 is in evidence. The Report of these Funds for 1974 (GCX 4, A. 45A), which is appended hereto as Exhibit "B", shows that Gessin is credited for 1974 with contributions of a total of \$502 to the Welfare Fund, a total of \$282.83 to the Pension Fund and a total of \$69 to the Annuity Fund. This Fund Report, which varies substantially from Gessin's monthly reports, suggests the inference that during 1974 Gessin made a percentage of payroll contributions to the Welfare Fund and Pension Fund for one employee, and contributions to the Annuity Fund for one employee for 69 of his days worked at \$1.00 per day worked (A. 32-33).

In reply to the Law Judge's inquiry with respect to how many employees he had, Gessin answered only "It varies from day to day" and "On and off" (A. 101-102). During the period that Gessin contributed only for the pension of Foreman Norman Chernoff, Chernoff allegedly was his only employee (A. 86).

Gessin Did Not Comply With The Expired Local 363 Contract.

Gessin did not cite any provision of his agreement with the November 14, 1973 expiration date which he complied with during 1974 and 1975.

Gessin testified that in February 1974 Local 363 told



him that new wage rates were being negotiated with a contractors association which would become applicable to Gessin (A. 83), but he did not testify that any such wage rate ever did become applicable to Gessin. Gessin did not testify that after 1973 he paid his employees either the wage rate set forth in the contract with the November 1973 expiration date, nor that he paid them any wage rate set forth in any subsequent master agreement signed by Local 363, nor that such master agreement ever was signed, nor that he consulted with Local 363 during 1974 or 1975 with respect to what wage rate he was obligated to pay.

Gessin further testified that he checked off union dues for only a few of his employees because his other employees either were "short-term employees" or they "elected to pay their dues directly to the union" (how Gessin knew whether they paid these dues directly is unexplained ) or because he paid their dues out of his company's pocket without deducting these sums from their pay (A. 96-97).

Although Gessin's personnel fluctuated, Gessin did not testify that he obtained any employees from Local 363 after 1973, although the expired agreement's hiring hall clause provides that Local 363 would supply Gessin employees in the first instance (GCX 2, Article II, A. 25).

#### THE ADMINISTRATIVE LAW JUDGE'S DECISION

The Law Judge's "suspicion" with respect to the actual date of execution of GCX 3, engendered by Gessin's attorney's "seeming lack of knowledge" thereof on October 16, 1975, was overcome by Gessin's record of contributions to Local 363



Funds during 1974 and 1975. As the Law Judge states (A. 11):

\*\*\*\*Further, Harvey Gessin's testimony concerning the date of execution of the extension agreement finds strong confirmatory support in the documentary evidence . . . which clearly establishes that Gessin implemented the February 1, 1974, extension agreement by making payments on behalf of the bargaining unit employees to Local 363's pension, welfare and other Funds, and by checking off and transmitting to Local 363 union dues of employees. It seems to me highly improbable that Gessin would have made payments of that kind in the absence of a contractual obligation to do so."

Surprisingly the Law Judge found that GCX3, which provides for an unspecified "cents per hour" wage increase, was a complete and valid agreement (A. 11-12) based upon Gessin's testimony that Local 363 President Canizio informed him that his employees' wage rate was to be established by Local 363's master agreement, which would supersede the wage rates in the expired agreement. At the time of the Board hearing on January 19, 1976, there was no indication that such master agreement had been consummated. The Law Judge's unstated interpretation of GCX 3 therefore appears to be that as of January 19, 1976 the "cents per hour" increase provided in GCX 3 resulted in no increase at all over the wage rate set forth in the agreement with the November 14, 1973 expiration date!

#### THE BOARD'S DECISION

By a two to one majority the Board implemented its "credibility" boilerplate decision, which sets forth the Board's policy of upholding credibility resolutions of Administrative Law Judges. Board Chairman Murphy dissented and found the picketing legal because a question concerning representation could be timely raised, and would dismiss the complaint in its



entirety (A. 3). Chairman Murphy did not specify whether her dissent was based upon the disbelief that GCX 3 was signed prior to the picketing or was based upon a belief that GCX 3 did not constitute a complete and valid agreement which barred a question concerning representation and therefore barred organizational picketing, or both.

#### ARGUMENT

The Law Judge's Finding That GCX 3 Was Signed In 1974 Was Not A Mere Credibility Resolution And Was Erroneous.

If Local 363 President Canizio had complied with his subpoena and not called in sick, and had testified that he signed GCX 3 on February 1, 1974, and if the Law Judge had credited the testimony as to the date of execution based primarily upon the conduct and demeanor of the witnesses, the Board and this Court understandably could not be expected to reverse such credibility resolution.

The Law Judge stated, however, that he could not understand Gessin's making of contributions to the Teamsters Funds were he not contractually bound to make them. This is not a credibility resolution. This finding was a deduction indicating a lack of familiarity with the unfortunate practice of some employers of making voluntary arrangements with certain unions to provide key man insurance for a few key men. Norman Chernoff seems to have been such a key man when he was Gessin's only employee (A. 86).

This Court should find that since on October 16, 1974 Gessin's attorney displayed only the agreement with the November 1973 expiration date and since a revelation of the



subsequent agreement, had it existed, could well have prevented picketing which Gessin clearly sought to prevent, the failure of an "extension agreement" to surface until the following month indicates that it was not executed until shortly before it was presented to the Board.

The "Extension Agreement" Did Not Bar A Question Concerning Representation.

Section 8(b) (7) permits organizational picketing for up to thirty days when a question concerning representation can be raised. This Court should rule that Gessin's extension agreement, the ambiguity of which with respect to wages remained unresolved two years later at the Board hearing, was not a complete and valid contract which meets the Board's standards of whether it "stabilizes the bargaining relationship" (See Board's Brief, p. 12) and therefore does not bar a question concerning representation nor bar Respondent's picketing.

An Injunction Would Not Effectuate The Purposes Of The Act.

The Law Judge's conclusion of law was that Respondent's picketing was to "force or require Gessin's employees to accept Respondent as their collective bargaining representative" (A. 12). On its face Respondent's picket sign was an appeal to Gessin's employees voluntarily to join Respondent. The Record lacks any evidence of Respondent's forcing or requiring anybody to do anything.

Assuming arguendo that the "extension agreement" was signed on February 1, 1974 and that it was a complete and valid agreement, and that Respondent picketed with an object of



forcing or requiring Gessin's employees to accept Respondent as their bargaining agent, and that Respondent committed a technical violation of Section 8(b)(7), such violation was due to Gessin's failure to make timely revelation of the existence of its "extension agreement".

More important, the Board is responsible for its failure to perform a registration function which would have obviated the picketing and obviated this proceeding. Not only does the Board not rule that an employer may not complain to it of picketing until it sends to the Board an index card setting forth its union contracts, dates of execution, dates of expiration and bargaining units covered, but the Board will not accept and register such information.

We respectfully urge that the policy of Section 8(b)(7) will best be effectuated, if this Court declines to enforce the Board's Order and suggests that the Board take one or more steps herein suggested to deter Section 8(b)(7)(A) picketing before it starts.

#### CONCLUSION

This Court should decline to enforce the Board's Order, and should dismiss the complaint.

Dated: New York, New York  
December 9, 1976

Respectfully submitted.

MENAGH, TRAINOR & ROTHFELD  
Attorneys for Respondent  
Office & P. O. Address:  
130 East 40th Street  
New York, New York 10016  
(212) 532-3850

Of Counsel:

Norman Rothfeld



AMENDMENT AGREEMENT MADE THIS 1st DAY OF February, 1974  
BY AND BETWEEN LOCAL 363, I.B. of T., HEREINAFTER CALLED UNION, AND  
Gessin Electrical Contractor  
WHOSE PRINCIPLE PLACE OF BUSINESS IS 345 East 94th Street., New York, NY  
HEREINAFTER CALLED COMPANY.

WHEREAS, THE UNION AND THE COMPANY HAVE HERETOFORE ENTERED INTO A  
COLLECTIVE BARGAINING AGREEMENT DATED February 26, 1973  
(WHICH AGREEMENT IS HEREINAFTER REFERRED TO AS MAIN AGREEMENT),  
AND

WHEREAS THE MAIN AGREEMENT IS ABOUT TO EXPIRE,  
AND

WHEREAS THE PARTIES DESIRE TO EXTEND SUCH MAIN AGREEMENT.

NOW THEREFORE, THE PARTIES AGREE AS FOLLOWS:

1. THE MAIN AGREEMENT SHALL CONTINUE FOR AN ADDITIONAL THREE YEAR  
PERIOD UPON THE SAME TERMS AND CONDITIONS EXCEPT AS MODIFIED HEREIN.

2. THE WAGE PROVISIONS OF THE AFOREMENTIONED MAIN AGREEMENT SHALL  
BE MODIFIED TO PROVIDE FOR AN INCREASE OF CENTS PER HOUR FOR EACH EMPLOYEE  
COVERED BY SAID AGREEMENT UPON THE FOLLOWING TERMS AND CONDITIONS.

a. THE WAGE CLAUSE SHALL UPON THIRTY DAYS WRITTEN NOTICE BY THE  
UNION BE REOPENED ON EACH ANNIVERSARY DATE HEREOF,  
AND

b. SHOULD THE UNION SIGN A MASTER AGREEMENT COVERING THE ELECTRICAL  
INDUSTRY THEN THE TERMS AND CONDITIONS OF SAID MASTER AGREEMENT AS THE PERTAIN  
TO THE WAGES OF EMPLOYEES SHALL BE SUBSTITUTED FOR THIS PARAGRAPH.

EXHIBIT. "A"

IN WITNESS WHEREOF:

THE PARTIES HERETO HAVE PLACED THEIR HANDS AND SEAL THE DAY AND YEAR  
FIRST ABOVE WRITTEN.

Gessin Electrical Contractors, Inc.

EMPLOYER

BY: 

LOCAL 363, I. B. of T.

UNION

BY: 



LOCAL 363 WELFARE FUND "E"  
LOCAL 363 PENSION FUND "E"  
LOCAL 363 ANNUITY FUND "E"

150 FIFTH AVENUE • NEW YORK, N. Y. 10011

Code # E 267

*Hessen Electric*

TO: All Contributing Employers

Gentlemen:

Shown below is the statement of contributions from your firm deposited  
to the funds indicated during the 1974 calendar year.

Local 363 Welfare Fund "E"	<u>502.00</u>
Local 363 Pension Fund "E"	<u>282.83</u>
Local 363 Annuity Fund "E"	<u>69.00</u>

If there are any discrepancies between this statement and your records,  
please notify our accountant:

Barry Surett, CPA  
83 Victoria Drive  
Clark, N. J. 07066

Sincerely,

*Edward J. Ferrari*  
Edward J. Ferrari  
Fund Operations

EJF:jk

EXHIBIT "B"



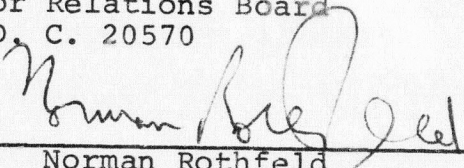
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v.	)	NO. 76-4203
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LOCAL 3, INTERNATIONAL BROTHERHOOD	)	
OF ELECTRICAL WORKERS, AFL-CIO,	)	
	)	
Respondent.	)	
	)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of Respondent's Brief in the above-captioned case, have this day been served by first class mail upon the following counsel at the address listed below:

Elliott Moore, Esq.  
Deputy Associate General Counsel  
National Labor Relations Board  
Washington, D. C. 20570

  
\_\_\_\_\_  
Norman Rothfeld

MENAGH, TRAINOR & ROTHFELD  
Attorneys for Respondent

Dated at New York, New York

this 13th day of December, 1976